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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 251

MAURICE F. O'CONNELL, *et al.*,

Petitioners,

against

JAMES E. ALLEN, Commissioner of Education of the State of New York, THE STATE EDUCATION DEPARTMENT, DIVISION OF PROFESSIONAL EDUCATION, UNVERSITY OF THE STATE OF NEW YORK,

Respondents.

BRIEF *AMICUS CURIAE* FILED ON BEHALF OF THE NEW YORK STATE SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS.

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August 22, 1961.

INDEX.

PAGE

INTRODUCTION 1

POINT I.—The interpretation of the statute herein involved is a matter for the highest court of New York and as construed by the court is clearly constitutional 3

POINT II.—The construction by the courts of New York of Education Law Section 7403 was the only reasonable construction of this statute 4

POINT III.—Petitioners have in any event failed to raise a constitutional issue in a timely manner 5

CONCLUSION 6

APPENDIX A.—L. 1959, c. 718 §1 7

APPENDIX B.—L. 1956, c. 545 10

Cases Cited.

	PAGE
Chapin v. *Fye*, 179 U. S. 127	6
Dent v. *West Virginia*, 129 U. S. 114	3
Erie R. Co. v. *Purdy*, 185 U. S. 148	5
Matter of Delmar Box Co., 309 N. Y. 60, 127 N. E. 2d 808 (1955)	5
Minnesota v. *Probate Court*, 309 U. S. 270	3
Oxley Stave Co. v. *Butler County*, 166 U. S. 648	5

Statutes Involved.

Fourteenth Amendment	5
New York State Education Law:	
§7403, subd. 2, L. 1959, c. 718, §1	2, 4
§7404, L. 1947, c. 340, repealed L. 1948, c. 629 §1	4

Authorities Cited.

Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States §66, p. 118 (1951)	5

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Introduction.

This case involves the construction of the New York statute involving certification of individuals as Certified Public Accountants. The courts of the State of New York have held that the statute requires passage of an examination and professional experience. Petitioners contend that this construction is unconstitutional and that on the basis of graduation from college alone they are entitled to certificates as Certified Public Accountants.

This brief is filed on behalf of the New York State Society of Certified Public Accountants (the "Society") as *amicus curiae* with the consent of counsel for both petitioners and respondents herein.

The Society is a membership corporation incorporated under the laws of the State of New York on January 25, 1897. Its membership includes accountants who have received certificates as Certified Public Accountants in New York or who have passed the examination prescribed by the University of the State of New York. Its membership as of the beginning of this year exceeded 11,000 persons.

New York has regulated use of the title "Certified Public Accountant" and the initials "C. P. A." since 1896. With one exception (which lasted for one year), passage of an examination testing applicants' proficiency in accounting matters has been a prerequisite to the gaining of a certificate of Certified Public Accountant for this period exceeding sixty years.

The facts as to the responsible part which certified public accountants play in the business life of New York, as indeed of all states, are basically familiar to all. Complete breakdown of the present system of close regulation of this respected profession would inevitably follow if petitioners' assertions prevail, *i.e.*, that neither the experience nor examination requirements as set forth in Section 7403 of the Education Law[1] of the State of New York need be met in their cases as prerequisites to the issuance to them of certificates as Certified Public Accountants.

The Society thus has a peculiar and legitimate interest in apprising this Court of the lack of substance to be found in petitioners' contentions herein.

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[1] New York State Education Law, §7403, subd. 2, L. 1959, c. 718 §1.

POINT I.

The interpretation of the statute herein involved is a matter for the highest court of New York and as construed by that court is clearly constitutional.

For the purpose of deciding constitutional questions this Court has held that it must take the statute involved "as though it read precisely as the highest court of the State has interpreted it." *Minnesota* v. *Probate Court*, 309 U. S. 270, 273. In the present proceeding, respondents' construction of the New York State Education Law has been upheld separately by two justices of the Supreme Court of that state, by the unanimous affirmation of five justices of the Appellate Division of the Supreme Court of the State of New York for the Third Department, and by affirmation of the Court of Appeals of the State of New York in denying petitioners' leave to appeal to that Court.

The construction of the New York State statute here involved is peculiarly a matter for the courts of that state and there is no basis or reason for issuing a writ of certiorari.

Different states have "from time immemorial" exacted in many pursuits certain degrees of skill and learning upon which the community may confidently rely, and have generally ascertained possession by applicants of such skills and learning by means of examinations. *Dent* v. *West Virginia*, 129 U. S. 114, 122.

The requirement for passage of an examination is clearly constitutional.

The New York State Courts' construction of the New York Education Law as requiring passage of an examination is eminently reasonable and is, in fact, the only permissible construction of the statute.

POINT II.

The construction by the courts of New York of Education Law Section 7403 was the only reasonable construction of this statute.

Petitioners in their petition to this Court fail to note that the laws of New York State have since 1896 required that an applicant for a certificate as Certified Public Accountant pass an examination which tests his knowledge and proficiency in accounting matters. The only exception has been a period of one year shortly after World War II in which persons over 40 years of age with at least 15 years' experience satisfactory to the State Board of Examiners could gain a certificate without examination. L. 1947, c. 340, repealed L. 1948, c. 629, §1.

Comparison of the 1959 amendment to the Education Law (Appendix A) under which petitioners applied for their certificates as Certified Public Accountants with its immediate statutory forerunner (Appendix B) reveals that no change was effected in the nature of the requirements governing formal education, passage of an examination, or the general requirements of professional experience. Even the language employed regarding these various requirements remained the same. The 1959 amendment merely rearranged the listing of these requirements into the chronological order in which applicants would logically meet them.

Petitioners contend that the New York State Legislature in adopting the 1959 amendment intended to delete the requirements for passage of an examination and professional experience. Nothing in the history of the statute will support any such intention to change completely the

requirements of then existing law. *Matter of Delmar Box Co.*, 309 N. Y. 60, 127 N. E. 2d 808 (1955).

Thus, Petitioners in their petition ignored the fact that Article 149 of the New York State Education Law, entitled "Public Accountancy" was extensively revamped in 1959. The clear governing purpose of the 1959 amendments to this article, including the section placed in issue by petitioners, was to bring non-certified public accountants under the system of regulation and ethical discipline theretofore exercised by the New York State Education Department over certified public accountants alone. Rather than relaxing regulation of certified public accountants the amendment *increased control* over the entire field comprising the practice of accounting by introducing a system of regulatory control and ethical discipline over non-certified public accountants as well.

POINT III.

Petitioners have in any event failed to raise a constitutional issue in a timely manner.

Petitioners, obviously recognizing the infirmity of their belated claim of deprivation of property rights under the Fourteenth Amendment of the United States Constitution, assert in their petition (p. 5) that a Federal question was raised "by the very nature" of the proceeding brought to compel issuance of certificates to them. This claim has no merit. *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 655. This Court has established the rule that a Federal question must be raised in the lowest state court where litigation commences if state procedure so requires. *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 153-54; *Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States*, §66, p. 118 (1951).

Petitioners also assert in their petition (p. 5) that they expressly raised a Federal question in their brief seeking leave to appeal to the New York Court of Appeals. An examination of this brief (p. 36) indicates only that a belated claim was made that "Under the provisions of the Fifth Amendment of the Constitution of the United States, the rights asserted by them were statutory property rights . . . .". No question was raised of deprivation of rights under the Fourteenth Amendment of the United States Constitution. Under the same circumstances this Court has refused to accept a question raised under the Fourteenth Amendment when a petitioner in applying to the highest state court had referred only to the Fifth Amendment. *Chapin* v. *Fye*, 179 U. S. 127.

Conclusion.

Petitioners' position is specious and far-fetched insofar as they assert an arbitrary construction of a state statute by the courts of New York. The constitutional question here sought to be raised was in any event not raised in a timely manner.

Respectfully submitted,

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APPENDIX A.

L. 1959, c. 718 §1.

"1. An individual shall not be eligible to apply for a certificate or an endorsement of a certificate as certified public accountant unless he is twenty-one years of age or over and of good moral character, is a citizen of the United States or has declared his intention to become a citizen thereof, and, except for an individual applying for indorsement of certificate as certified public accountant, resides or has a place for the regular transaction of business within the state. The date on which the applicant for a certificate passed the last part of the examination required by subdivision two of this section shall be the date on which his legal residence shall be determined for the purpose of eligibility for such certificate.

"2. An individual shall not be eligible to apply for a certificate as certified public accountant unless he has satisfactorily completed a four year high school course approved by the department for this purpose or the equivalent as determined by the commissioner, and either (a) has been graduated from a college, offering a curriculum in accounting which shall have been registered by the department, or (b) has been graduated from college and has had equivalent college training in accountancy as determined by the commissioner and has the professional experience required by the regulations of the commissioner and passes the examination required by the department or has passed, before the enactment of this article, all parts of the examination required by the department but has not received a certificate as a certified public accountant because of the lack of the professional experience required by the regulations of the commissioner. The department on the recommendation of the board may also accept in lieu of the passing of the whole or any part of the examination referred to herein, satisfactory proof of the passing of an examination of similar grade and content, or part thereof, given by the

board of examiners or corresponding agency in another state.

"3. The department, upon the filing with it of an application, accompanied by the prescribed fee, shall issue a certificate as a certified public accountant of the state to any individual who submits evidence satisfactory to the department that he complies with the requirements of subdivisions one and two of this section.

"4. The department, upon the filing with it of an application, accompanied by the prescribed fee, and upon the recommendation of the board, may, in its discretion, without examination and without requirements as to residence or place of business, but otherwise subject to the academic and professional experience requirements set forth in subdivision two of this section, and the rules of the commissioner promulgated thereunder, indorse a certificate of a certified public accountant issued by another state or any political subdivision of the United States, provided that the applicant is in good and regular standing as a certified public accountant in each state or political subdivision of the United States from which he has ever received a certificate of certified public accountant. Except as otherwise provided in this article, such indorsement shall be deemed to be a certificate of certified public accountant of the state and an individual to whom such an indorsement shall have been made shall be deemed to be a certified public accountant of the state.

"5. A certificate of certified public accountant of the state issued at any time prior to the date when the present provisions of subdivisions one and two of this section shall have become effective shall be deemed to be a certificate of certified public accountant of the state and an indorsement of a certificate of certified public accountant of any other state or any political subdivision of the United States made prior to the date when the present provisions of the subdivision four of this section shall have become effective shall be deemed to be an indorsement pursuant to this article of a

certificate of certified public accountant of any other state or political subdivision of the United States; and any individual to whom such a certificate of certified public accountant of the state shall have been issued or for whom such an indorsement shall have been made shall while such certificate or indorsement shall be unrevoked and unsuspended be a certified public accountant of the state.

• • • • • •

"7. The certificate or the indorsement of the certificate as a certified public accountant issued pursuant to this section of an individual not a citizen of the United States shall become void at the expiration of eight years from the date of his declaration of intention to become a citizen, unless prior to the expiration of the said eight years evidence is furnished to the department that the said individual has become a citizen of the United States."

APPENDIX B.

L. 1956, c. 545

"1. The certificate of certified public accountant of the state shall be issued, upon application to the department and the payment of a fee to be fixed by the department, which fee is to accompany the application, to any citizen of the United States, or to any person who has declared his intention of becoming such citizen, who resides within the state or has a place for the regular transaction of business therein, who is twenty-one years of age or over and of good moral character, who submits evidence satisfactory to the department of the possession of academic and professional qualifications for the public practice of accountancy and who passes the examination required by the department; provided, that the certificate of certified public accountant of the state issued to any person who has declared his intention of becoming a citizen of the United States shall become void at the expiration of eight years from the date of the declaration of the intention of such applicant to become a citizen, unless prior to the expiration of said eight years evidence is furnished to the department that the applicant has become a citizen of the United States. Provided, further, that every candidate for examination for a certificate of certified public accountant of the state shall present evidence that he has graduated from a college offering a curriculum in accounting which shall have been registered by the department, or that he has graduated from college and has had equivalent college training in accountancy as determined by the commissioner of education, and that prior to the beginning of his course of study in such college he satisfactorily completed a four year high school course approved for this purpose or the equivalent as determined by the commissioner of education. The department on the recommendation of the board may also accept in lieu of the passing of the whole or any part of the examination referred to herein, satisfactory proof of the passing of an examination of similar grade and content, or part thereof, given by the board of examiners or corresponding agency in another state."